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No. 82-740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,

v.

STATE OF ALABAMA EX REL.
THARPE FORRESSTER, COMMISSIONER OF
INSURANCE OF THE STATE OF ALABAMA

and

PROTECTIVE LIFE INSURANCE CO.,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF TEXAS INSTITUTE OF GOVERNMENT IN SUPPORT OF PETITIONER

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MOTION OF TEXAS INSTITUTE OF GOVERNMENT FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the rules of this Court, Texas Institute of Government respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner.

Counsel for petitioner has consented to the filing of this *amicus* brief, and his letter of consent is being filed with the Clerk. Counsel for respondents have refused consent.

Texas Institute of Government is a charitable and educational organization incorporated in Texas. As reflected in its Articles of Incorporation, its purposes include research and analysis of public policy questions per-

taining to improving the administration of state and local government in Texas and the education of the general public thereto. *Amicus* is vitally concerned with the proper functioning of governmental agencies in Texas, including the Texas State Board of Insurance, and with maintaining an appropriate balance between the interests of such agencies and the rights of individual citizens.

The issue raised by the petition is of particular concern to *amicus* because from 1970 to the present Texas courts have issued 33 injunctions similar to the injunction issued below (Petition, E-1), and because the injunction below prevents petitioner from filing a complaint in a federal district court in Texas. Petition at 3.

Amicus is aware that, absent consent of all parties, the filing of an *amicus* brief at this stage is not favored. Accordingly, we are requesting leave to file the annexed brief only because we believe the judgment below threatens an exceptionally important individual liberty—the right of a citizen to petition a federal court to enforce federally created rights without first having to persuade a state court to authorize the petition—and because we believe there are substantial reasons, in addition to the reasons advanced in the petition, why the Court should grant review.

For example, *amicus* will urge that the injunction below, and the Alabama statute authorizing it, are void under the Supremacy Clause, and are inconsistent with decisions of this Court construing the Supremacy Clause, insofar as they totally preclude petitioner from litigating federal causes of action for which Congress has created exclusive jurisdiction in the federal courts.

Amicus will urge that the judgment below conflicts with *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), and other decisions in which this Court has held that state courts cannot directly or indirectly enjoin federal officials from performing federal functions.

And *amicus* will urge that the judgment below conflicts with decisions by this Court establishing that a state bears the burden of justifying limitations on First Amendment liberties by establishing the existence of a compelling or substantial state interest and showing that no less drastic alternatives would satisfy that interest. As *amicus* will demonstrate, the court below failed to apply correct First Amendment analysis and improperly placed on petitioner the burden of justifying his exercise of fundamental First Amendment rights.

These and other arguments contained in the annexed *amicus* brief have not been fully addressed by petitioner.

In order to present these additional arguments, Texas Institute of Government respectfully moves for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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Dated: Washington, D.C.
November 24, 1982

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BRIEF OF AMICUS CURIAE TEXAS INSTITUTE OF GOVERNMENT IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE TEXAS INSTITUTE OF GOVERNMENT

The interest of *amicus curiae* appears in the foregoing motion.

INTRODUCTION

Amicus is taking the unusual step of filing a brief at this stage in order to indicate to the Ccurt our belief that the judgment below raises important and unsettled

issues of constitutional law and threatens the fundamental right of citizens to petition the federal courts for redress of grievances. This petition squarely presents the question whether a state court with jurisdiction over a receivership can enjoin a citizen from filing in federal court a complaint which is purely *in personam* in nature and which includes causes of action which Congress has placed in the *exclusive* jurisdiction of the federal courts. *Amicus* believes the Court should grant the petition to review this important question.[1]

In 1975, acting pursuant to the extremely broad provisions of Alabama Code, Title 20, § 27-32-5(b),[2] previously Alabama Code, Title 28A, § 624, an Alabama court

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[1] The proceedings below could fairly be understood as challenging the constitutionality not only of the state court injunction, but also of the state statute authorizing that injunction, as applied to the facts of this case. Viewed in that way, petitioner would be entitled to *appeal*, rather than simply seek *certiorari*, because the Alabama Supreme Court upheld the validity of the statute despite the argument that, as applied to enjoin *in personam* actions, the statute was repugnant to the federal Constitution. *See* 28 U.S.C. § 1257(2); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971). Although petitioner has chosen not to appeal, the fact that the issue could probably have been raised by appeal rather than by petition for writ of *certiorari* indicates that the issue is of a type considered appropriate by Congress for the obligatory jurisdiction of this Court, and suggests another reason why the Court should exercise its discretion to grant the petition.

[2] Petition, D-1:

> (b) The court may, at any time during a proceeding under this chapter, issue such other injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens or the making of any levy against the insurer or against its assets or any part thereof.

issued an even broader injunction,[3] which prohibited petitioner from filing "any lawsuit" in "any court" against John G. Bookout (not only as Receiver of Empire Life Insurance Company of America, but also "as an in-

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[3] It is ORDERED, ADJUDGED AND DECREED THAT

(1) any and all policy holders, stockholders and agents, present or former, of Empire Life Insurance Company of America, and

(2) Shearn Moody, Jr., his officers, agents, servants, employees and attorneys (including, but without limitation, Donald L. Collins, A. Eric Johnston, Dale R. Major, Scott E. Manley, A.R. Schwartz, and Thomas R. Beech), and those persons in active concert or participation with any of the foregoing be permanently restrained and enjoined from filing, financing, sponsoring, initiating, or aiding, in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court whatsoever located on behalf of any party whatsoever against:

(1) John G. Bookout, as an individual;

(2) John G. Bookout as Receiver of Empire Life Insurance Company of America, his officers, agents, employees and attorneys;

(3 the Ancillary Receivers of Empire Life Insurance Company of America, their officers, agents, employees and attorneys;

(4) Protective Life Insurance Company, its officers, agents, employees and attorneys; or

(5) any other person or legal entity which lawsuit or claim relates to or affects directly or indirectly:

(a) the affairs of Empire Life Insurance Company of America;

(b) its receivership;

(c) its Receiver;

(d) the Treaty of Assumption and Bulk Reinsurance, as amended, between the Receiver and Protective Life Insurance Company; or

(e) the implementation of any order or decree of this Court in this proceeding, unless such policyholders, stockholders or agents or said Shearn Moody, Jr., his officers, agents, servants, employees and attorneys and those persons in active concert or participation with them shall first receive the prior approval of this Court.

dividual") or against "any other person," provided that the lawsuit related to "or affects" directly "or indirectly" either the receivership, or more generally, "the affairs of Empire Life," without the prior approval of that court.[4]

Petitioner sought approval to file a purely *in personam* action in federal court. He specifically alleged that the "proposed action for damages will in no way interfere, delay or stop the Empire Life receivership proceedings." Petition, A-1. Apparently, that allegation was never formally denied, but the court nevertheless refused permission to file the proposed complaint because petitioner "offered no testimony or other evidence tending to show" that his allegation was true, because the litigation would "not involve the Empire receivership proceedings," and because "Moody has failed to carry the burden of proving that the relief sought by the pending motion should be granted . . . ." Petition, B-2.

The Alabama Supreme Court affirmed, again on the ground that petitioner had "failed to offer any evidence that the proposed action in the United States District Court did not involve the Empire Life receivership proceedings." Petition, A-2.

SUMMARY OF ARGUMENT

This case raises a novel constitutional question not previously considered by this Court: whether a state court injunction prohibiting a litigant from asserting in federal court claims within the exclusive jurisdiction of the federal courts frustrates congressional policies and violates the Supremacy Clause. *Amicus* believes that the congressional determination to vest in federal courts ex-

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[4] Since the proviso clause literally modifies only paragraph (5) of the injunction, it appears that the injunction prohibits suit against Bookout "as an individual" even if the suit does not even arguably affect the receivership or the affairs of Empire, even indirectly.

clusive jurisdiction over claims arising under the Sherman Act and the Organized Crime Control Act is a determination that federal courts will occupy the field with respect to those federal claims and that injunctions such as the one issued by the Alabama courts in the present case, which bar citizens from asserting those federal claims in any court, violate the Supremacy Clause. Point I.A.

Petitioner also believes that the judgment below is inconsistent with *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976), and other decisions of this Court holding that state laws or injunctions which impinge upon federally created rights must be narrowly drawn or they will violate the Supremacy Clause. Point I.B.

In our view, the judgment below is inconsistent with *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1892), and other decisions of this Court holding that state courts cannot directly or indirectly enjoin federal officials from performing federal functions. Federal courts clearly have jurisdiction to determine whether they have or should exercise jurisdiction, and making that determination is a function federal judges necessarily perform. Here, however, the judgment below strips federal courts of the authority to determine their own jurisdiction. Point II.

Finally, *amicus* believes the judgment below is in several respects directly inconsistent with prior decisions of this Court construing the Petition Clause of the First Amendment. The Court has ruled that the "right of access to the courts is . . . one aspect of the right of petition." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 405, 410 (1972). The right to petition, like other First Amendment rights, can be abridged (or, as in this case, totally extinguished) only if the *state* bears the burden of showing that the abridgment is necessary to protect an important or compelling state interest and is the least drastic alternative that can be

used to protect that state interest. *Larson* v. *Valenti*, 102 S.Ct. 1673, 1685 (1982); *Widmar* v. *Vincent*, 102 S.Ct. 269, 274 (1981); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Thornhill* v. *Alabama*, 310 U.S. 88, 98 (1940).

Here, however, the Alabama courts placed on *petitioner* the burden of showing why he should be permitted to exercise his First Amendment right to petition, and they failed to require the state to demonstrate that no less drastic alternative than total extinguishment of his right to petition would suffice to protect the state's interests.

There were several alternatives that would appear adequate to protect the state's interest in prohibiting undue interference with a state receivership proceeding. The state could have relied on the discretion of the federal court either to decline to exercise jurisdiction or to deny any relief that would unduly interfere with the receivership proceedings. The state could have tailored its rather sweeping injunction more narrowly, or it could perhaps have required petitioner to delete certain claims or allegations from his proposed complaint, allowing the others to proceed. Finally, instead of a prior restraint on the right to petition, the state could have relied on the deterrent effect of its ability to punish petitioner for contempt if his actions actually did interfere with the receivership. In these and other ways the judgment below is directly inconsistent with prior decisions of this Court and utterly destroys one of "the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967). Point III.

In *amicus'* view, the judgment below is so clearly inconsistent with prior decisions of this Court that the Court should not only grant review, but should summarily reverse.

ARGUMENT

I. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION UNDER THE SUPREMACY CLAUSE AND IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT CONSTRUING THAT CLAUSE.

The Supremacy Clause, Art. VI, § 2 of the Constitution, provides that the "Laws of the United States" "shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."[6] The touchstone of Supremacy Clause analysis, when a state action is alleged to conflict with a federal statute, is congressional intent. *Retail Clerks International Association* v. *Schermerhorn*, 387 U.S. 96, 103 (1963). Where Congress has not explicitly stated its intent to preempt state law, this Court will invalidate a state law if it "conflicts with federal law or would frustrate the federal scheme" or if the Court "discern[s] from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Malone* v. *White Motors Corp.*, 435 U.S. 497, 504 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

A. The Judgment Below Raises a Novel and Important Question Under the Supremacy Clause That Has Not Previously Been Considered by This Court.

This case presents an important and novel constitutional question: whether a state court violates the Supremacy Clause when it issues an injunction prohibiting a litigant from filing claims within the *exclusive* jurisdiction of the federal courts. Petitioner's proposed complaint alleged violations of two federal statutes—the Organized Crime Control Act of 1970, 18 U.S.C. § 1961,

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[6] Petitioner also relies on Supremacy Clause arguments. *See* Petition at 2, 12, 16. Accordingly, the arguments raised in this *amicus* brief are properly before the Court.

and the Sherman Act, 15 U.S.C. § 4—as to which Congress has vested jurisdiction in the federal courts to the exclusion of the state courts.[6] The congressional determination to depart from the ordinary practice of giving federal and state courts concurrent jurisdiction over federal causes of action reflects the important federal policies underlying those statutes.

It would clearly frustrate those policies and violate the Supremacy Clause if a state court assumed jurisdiction over a Sherman Act or Organized Crime Control Act case notwithstanding the congressional determination to vest exclusive jurisdiction in the federal courts. It would equally frustrate congressional policies if a state court were permitted to *prevent* litigants from bringing their Sherman Act or Organized Crime Control Act claims in *federal* court.[7] States may not, without contravening the Supremacy Clause, "burden access to the federal courts" in violation of congressional policies. *Ehlers* v. *City of Decatur*, 614 F.2d 54 (5th Cir. 1980).[8]

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[6] *See* authorities cited in Petition at 19 note 34. Petitioner sought to raise other federal claims over which the state courts would have concurrent jurisdiction. The Supremacy Clause argument advanced here might apply also to the state court injunction forbidding petitioner from litigating those non-exclusive federal claims. But for simplicity of analysis we will discuss the Supremacy Clause only as it applies to the injunction against filing federal claims over which the federal courts have exclusive jurisdiction. If the injunction violates the Supremacy Clause in that regard, as we contend, the decision below would have to be vacated, and the state courts could then consider the applicability of the Supremacy Clause to the non-exclusive federal claims.

[7] Several decisions of this Court have suggested that where federal rights are involved, state courts are under a constitutional duty to vindicate them. *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908); *Testa* v. *Katt*, 330 U.S. 386 (1947). Similarly, where federal rights are involved, state courts may be under a constitutional duty not to *frustrate* their vindication by federal courts.

[8] The frustration of congressional policies is at least as evident here as it was in *Toll* v. *Moreno*, 102 S. Ct. 2977 (1982), this Court's

Moreover, a congressional determination to vest exclusive jurisdiction in federal courts over particular causes of action is tantamount to a determination that federal courts would occupy the field as to those causes of action. Congress obviously intended that only federal courts would decide whether to allow Sherman Act or Organized Crime Control Act actions to proceed. At the least, the decision below raises a constitutional issue of sufficient magnitude and importance to warrant this Court granting the petition for a writ of *certiorari*.[9]

B. The Judgment Below Is Inconsistent with Prior Decisions of this Court Construing the Supremacy Clause.

In addition, state laws or injunctions which impinge upon federally created rights must be narrowly and precisely drawn or they will violate the Supremacy Clause. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 605 (1976). The Alabama statute is extremely broad,[10] and the Alabama courts made no effort to narrow the injunction or to permit petitioner to assert some claims or allegations, but not others. The judgment below is therefore inconsistent with *Examining Board* and other decisions of this Court construing the Supremacy Clause.

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most recent decision striking down a state action on Supremacy Clause grounds. *Toll* was a challenge by holders of nonimmigrant alien visas to a decision by the University of Maryland to deny them in-state status and tuition benefits. Even though the state's action did not directly conflict with any federal statute or regulation, the Court held that it violated the Supremacy Clause because it burdened or frustrated federal policies.

[9] As Appendices D and E to the Petition indicate, several states have statutes similar to Alabama's, and injunctions similar to the injunction below are quite common.

[10] *See* note 2, *supra*.

II. THE JUDGMENT BELOW IS INCONSISTENT WITH TARBLE'S CASE AND OTHER DECISIONS OF THIS COURT HOLDING THAT STATE COURTS CANNOT DIRECTLY OR INDIRECTLY ENJOIN FEDERAL OFFICIALS FROM PERFORMING FEDERAL FUNCTIONS.

It is clear—again, under the Supremacy Clause—that an Alabama court could not directly enjoin a federal court from deciding whether that federal court had, or should exercise, jurisdiction over asserted federal causes of action. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872); *McClung* v. *Selliman*, 19 U.S. (6 Wheat.) 598 (1821); *Ex parte Schockley*, 17 F.2d 133 (N.D. Ohio 1926); *Armand Schwall, Inc.* v. *Federal Reserve Bank*, 286 N.Y. 503, 37 N.E.2d 225 (1941). And it is clear from *Donovan* v. *City of Dallas*, 377 U.S. 408, 413 (1964) that there is no difference between an injunction forbidding a *party* from filing a federal complaint and a direct restraint on the federal judiciary: "it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself." [11] In both cases the federal court is precluded from deciding for itself whether it has or should exercise jurisdiction.

Federal courts have exclusive authority to determine their own jurisdiction and they have always reserved for themselves the power to decide whether they have or should exercise jurisdiction.[12] To allow states to determine whether federal courts have or should exercise jurisdiction, particularly over federal causes of action

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[11] It is also clear from *General Atomic Co.* v. *Felter*, 434 U.S. 12, 17 (1977), that "the rights conferred by Congress to bring in personam actions in federal courts are not subject to abridgment by state court injunctions, regardless of whether the federal litigation is pending or prospective."

[12] *E.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *United States* v. *United Mine Workers*, 330 U.S. 258, 292-293 (1947).

for which federal courts have been given exclusive jurisdiction, would effectively limit federal judges to considering only those issues which states would permit them to consider. This would appear to be a clear violation of *Tarble's Case* and the principles of federal supremacy on which that case is based. At the least, this Court should grant the petition in order to address the applicability of *Tarble's Case* to the actions of the Alabama courts.

III. THE JUDGMENT IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT WHICH TOGETHER PROVIDE THAT THE RIGHT TO PETITION A FEDERAL COURT IS A FIRST AMENDMENT RIGHT WHICH THE STATE CAN TOTALLY ABRIDGE ONLY IF IT BEARS THE BURDENS OF JUSTIFYING THE ABRIDGMENT AND OF SHOWING THERE ARE NO LESS DRASTIC ALTERNATIVES.

We start with the proposition that the right to petition the courts for redress of grievances is an ancient and fundamental right that is protected by the First Amendment. The right to petition can be traced at least to the 13th Century. The Magna Carta, or "Great Charter of Liberties," resulted from a petition feudal barons presented to King John in 1215;[13] and the right almost certainly existed even before Magna Carta.[14] The practice

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[13] *See* W. McKechnie, *Magna Carta* 38 (1914). *See also* O. Holt, *The Making of Magna Carta* (1965); A. Pallister, *Magna Carta—The Heritage of Liberty* (1971); *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82, 92d Cong., 2d Sess. 1031 (1973); W. Stubbs, *The Constitutional History of England* 413 (J. Cornford ed. 1979) (tracing right to petition to the articles of the barons in 1215 and other precedents from 1258, 1301, 1309, and 1310).

[14] One commentator states that "[t]he right of every subject to petition the sovereign *had always existed*." A. White, *The Making of the English Constitution* (2d ed. 1925) (emphasis added). Another authority states that "[t]he right of petitioning the crown

of petitioning the government for redress of grievances became institutionalized with the development of parliament in the 13th Century. Some of those petitions were private individual requests which were handled by proceedings of a judicial nature.[15] Thus, even at this very early stage of constitutional development, the right to obtain redress of grievances through judicial proceedings was viewed as fundamental.[16]

This Court has recognized that the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967). *Cf.*

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and parliament was one of the most valuable possessed by the subject, and seems to have been exercised from the earliest times." F. Plucknett, *Taswell-Langmead's English Constitutional History* 669 (11th ed. 1960). The earliest recorded petition may have been in 1013, when London fell to the Danes and Aethelred II (also known as "the Unready") fled to France. The English leaders, according to the *Anglo-Saxon Chronicle*, sent him a Remonstrance listing grievances and summoning him to appear before the witan. He sent his son Edward with a written message that he "would remedy each one of the things which they all abhorred, and everything should be forgiven that had been done or said against him, on condition that they all unanimously and without treachery return to their allegiance." This brief message, responding to a petition for redress of grievances, may be the first recorded document of liberty in English history. *See* Marsh, *Documents of Liberty* 13-14 (1971).

[15] *See* W. Stubbs, *supra* n.13, at 413. British constitutional practice did not distinguish petitions of a judicial, executive, or legislative nature. This early history makes clear that litigants appearing in court are exercising their right of petition no less than individuals communicating on matters of public business with the executive or legislative branches.

[16] It is noteworthy that the right of petition evolved separately from the more general right of speech. Indeed, the right of petition was firmly established at least four hundred years before the right of speech received recognition. *See generally* L. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* 88-125 (1960).

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). It is a basic attribute and privilege of national citizenship. *In re Quarles*, 158 U.S. 532, 535 (1895); *United States* v. *Cruikshank*, 92 U.S. (2 Otto) 452 (1876). And, as this Court stated in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 405, 410 (1972), the "right of access to the courts is . . . one aspect of the right of petition." Thus, petitioner, in seeking to file his complaint in federal court, was without doubt attempting to exercise his basic First Amendment right to petition.

Both state and federal courts are required to apply "exacting scrutiny" to state actions challenged as abridging fundamental First Amendment rights, such as the right to petition, the right to speak, and the right to exercise one's religion. *Citizens Against Rent Control* v. *City of Berkeley*, 102 S.Ct. 434, 440 (1981); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976) (per curiam). If the state action is found to burden First Amendment rights, it will be upheld only if it is justified by a sufficiently important governmental interest and only if it is narrowly tailored to further that interest. *Larson* v. *Valenti*, 102 S.Ct. 1673, 1685 (1982); *Widmar* v. *Vincent*, 102 S.Ct. 269, 274 (1981); *First National Bank of Boston* v. *Bellotti*, *supra*. Furthermore, the *state* bears the burden of demonstrating that its interest is sufficiently important and that the means it has chosen are the least restrictive of First Amendment liberties. *See Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Talley* v. *California*, 362 U.S. 60, 66-67 (1960) (Harlan, J., concurring); *Thornhill* v. *Alabama*, 310 U.S. 88, 98 (1940). The decision below represents a particularly egregious failure to heed the constitutional principles articulated by this Court in these and other cases.

A. The Court Below Failed to Insist That the Restriction on Petitioner's First Amendment Rights Be Justified by a Sufficiently Important State Interest.

As *amicus* has argued above, petitioner's attempt to petition the federal courts for the redress of grievances involved the exercise of a fundamental constitutional right entitled to a high degree of protection under the First Amendment. *Amicus* believes that only a compelling state interest can justify abridging petitioner's right to petition. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *Cf. Douglas* v. *California*, 372 U.S. 353 (1963); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). This is especially true where, as here, the state action is a *total prohibition* of the exercise of a First Amendment right, rather than a regulation that merely limits the individual's freedom of action. *Cf. Schad* v. *Borough of Mount Ephraim*, 101 S.Ct. 2176, 2186 (1981). But even if the state interest need not be compelling, the state must *at least* demonstrate the existence of an important interest and must show that the abridgment is necessary to achieve that interest.

In the present case, the decision below was evidently grounded in Alabama's interest in preserving the integrity of insurance company receivership proceedings. *Amicus* does not dispute that a state court's interest in preserving jurisdiction over the subject matter of an action *in rem* may sometimes authorize prohibition of *in rem* actions in other jurisdictions that would disrupt the state's judicial processes. *See Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U.S. 456 (1939). That interest is limited in scope, however, and is not sufficient to justify a prohibition of *in personam* actions that have, at most, a tangential impact on the state's judicial processes. *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964); *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977); *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978). In the present case, petitioner sought only to initiate a purely

in personam action in federal court that would not have significantly disrupted the state proceedings. Accordingly, the state interest on which the court below apparently relied was not sufficiently compelling or important to justify the serious intrusion on petitioner's First Amendment rights authorized by the injunction.

B. The Court Below Failed To Insist that the Restriction on Petitioner's First Amendment Rights Be the Least Restrictive Means Necessary to Protect the State's Interest.

The decision of the court below failed even to consider whether the interests which the state sought to advance by its injunction could be satisfied by a means less restrictive of First Amendment freedoms. The decision therefore conflicts with prior decisions of this Court holding that state regulation of protected First Amendment interests must be narrowly drawn and that the state must use the least restrictive means that will protect its interests. *E.g., Schad* v. *Borough of Mount Ephraim, supra*, at 2183; *Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

Several alternatives appear to be adequate to protect the state's interests in the present case. For example, the state could rely on the federal district court, acting on its own motion, or at the request of the defendants or the state, to defer ruling on the federal complaint or to refrain from authorizing any relief that would in any way interfere with the receivership proceedings.[17] Or instead of a global injunction, as here, the state could narrow the scope of the injunction or could perhaps pro-

[17] Petitioner did not and does not assert that the federal court would have been required to consider or decide his federal complaint on the merits. He asserts only that the federal court should have been given the opportunity to decide for itself whether to consider the merits.

hibit petitioner from filing the proposed complaint unless petitioner amended the complaint to delete particular claims or allegations which in the state's view would interfere with the receivership.

As another alternative, the state could rely on the deterrent effect of its ability, *after* actual interference with the receivership, to punish petitioner for contempt. Indeed, the same considerations which preclude prior restraint of First Amendment rights, while authorizing subsequent criminal punishment,[18] would preclude a total prior restraint of petitioner's right to petition, particularly where, as here, a subsequent punishment is available to the state.

C. The Court Below Improperly Placed the Burden of Justification on Petitioner, Rather than on the State.

Perhaps the most fundamental error of the decision below is its evident insistence that the *petitioner* bear the burden of justifying the exercise of his First Amendment right to initiate litigation in federal court.[19] As *amicus* has shown, it is the *state*, rather than the individual whose rights are abridged, that must justify its action by demonstrating the existence of a sufficiently important governmental interest and the lack of less restrictive means to satisfy that interest. *E.g.*, *Linmark Associates, Inc.* v. *Township of Willingboro*, *supra*; *Talley* v. *California*, *supra*. The decision below, by failing to require this showing by the state, conflicts with prior decisions of this Court, and constitutes clear error of constitutional dimension.

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[18] *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976). *See also Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1968).

[19] Alabama Supreme Court Judgment and Opinion (Petition, A-2); Circuit Court Order and Decree (Petition, B-2).

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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